



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: South Gulf, Inc.; D.R. Construction Company;
Firetech Automatic Sprinkler

File: B-265780; B-265781; B-265810; B-265818

Date: August 23, 1995

DECISION

South Gulf, Inc., D.R. Construction Company, and Firetech Automatic Sprinkler each protest a Department of Defense (DOD) small disadvantaged business (SDB) set-aside procurement,¹ contending that the set-aside is inconsistent with Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).

In Adarand, the Supreme Court held that racial classifications must be subject to strict scrutiny and must serve a compelling government interest and be narrowly tailored to further that interest. The protesters assert that these SDB set-asides, with eligibility requirements that in very large measure are based on race, see Defense Federal Acquisition Regulation Supplement §§ 219.001, 252.219-7000; 13 C.F.R. § 124.105 (1995), do not meet the standard set forth in Adarand and therefore are unconstitutional.

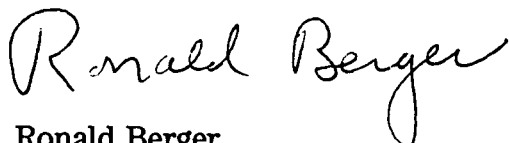
Our general position on cases such as this is that there must be clear judicial precedent before we will consider a protest based on the asserted unconstitutionality of the procuring agency's actions. In this regard, we do not view Adarand as providing clear judicial precedent on the constitutionality of the DOD SDB set-aside program. See Elrich Contracting Inc.; The George Byron Company, B-262015; B-265701, Aug. 17, 1995, 95-2 CPD ¶ ____.

In Elrich, we noted that Adarand, which dealt with a Department of Transportation (DOT) program involving financial incentives to prime contractors awarding subcontracts to SDBs, did not determine the constitutionality of the DOT program before it or any other racially-based program. The Court in Adarand simply announced the standard that is to be applied in determining the constitutionality of such programs and remanded the case to the lower courts for further consideration.

¹South Gulf, Inc. protests Department of the Navy solicitation Nos. N62766-95-B-0404 and N62766-95-B-0407; D.R. Construction Company protests Department of the Air Force solicitation No. F38610-95-B-0025; and Firetech Automatic Sprinkler protests Department of the Navy solicitation No. N62474-95-B-4774.

in light of the principles announced. Thus, whether any particular program is indeed unconstitutional has been left to the lower federal courts to determine in the first instance.

Thus, there is no basis for us to consider Adarand as clear judicial precedent on the question of the constitutionality of the SDB set-aside program challenged here. Accordingly, consistent with our long-standing practice, the protests are dismissed.

A handwritten signature in cursive script that reads "Ronald Berger". The signature is written in dark ink and is positioned above the printed name and title.

Ronald Berger
Associate General Counsel